

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2211 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

NITINBHAI P VARIA

Versus

STATE OF GUJARAT

Appearance:

MR DM THAKKAR for Petitioner
MS PS PARMAR for Respondent No. 1, 2
MR SR BRAHMBHATT for Respondent No. 4
None present for other Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 30/07/97

C.A.V. JUDGEMENT

1. The petitioner, a Junior Clerk in the Regional Transport Office, Bhavnagar, under the Director of Transport, Government of Gujarat, filed this Special Civil Application and prayer has been made for issuance of a writ of mandamus and/or a writ in the nature of mandamus and/or any other appropriate writ, order or directions declaring the action of the respondents in not operating the select list of the selected candidates, for the post of Assistant Regional Transport Officer, and not making appointment of the petitioner in pursuance of the

select list is illegal, arbitrary and unconstitutional. Further prayer has been made for direction to the State Government to fill up the vacancies of A.R.T.Os. by way of direct recruitment, by operating the waiting list and making appointments of the persons, who are already selected including the petitioner and to give the deemed date of appointment. Further consequential prayers have also been made.

2. The facts which are not in dispute are that the post of Assistant Regional Transport Officer in the Transport department of the Government of Gujarat is a post to be filled in both by direct recruitment and promotion under the provisions of Assistant Regional Transport Officers Recruitment Rules, 1972 (hereinafter referred to as the Rules, 1972). These rules were framed under Article 309 of the Constitution. The direct recruitment has to be made amongst the candidates who are selected on the post by the Gujarat Public Service Commission. The ratio of promotion and direct recruitment is 2 : 1 under the Rules, 1972 i.e. first two vacancies by promotion and third by direct recruitment. An advertisement for the post of A.R.T.Os. came to be released by the G.P.S.C. on 16th October, 1982. The petitioner has not produced on record a copy of the said advertisement, and as such, it is not clear that how many posts of A.R.T.Os. were advertised for selection and appointment by the G.P.S.C.. However, it is not in dispute that the interviews were held for the post of A.R.T.Os. in pursuance of the said advertisement in the month of May, 1985 and result thereof was declared in the month of October, 1985. So the selection result was declared after three years of the date of publication of the advertisement. It is not in dispute that the petitioner's name figured in the waiting list published by the G.P.S.C.. So his name was not there in the main list of the selectees. The case of the petitioner is that ten vacancies of A.R.T.Os. are lying vacant in the department, and as such, the waiting list should have been operated and he should have been given the appointment. It has further been stated that one post of R.T.O. is vacant since 2-8-1983 at Bhavnagar and one post of R.T.O. is vacant at Nadiad since 19-2-1986 and therefore, in case two A.R.T.Os. are promoted to these two posts then two more posts of A.R.T.Os. will be available for recruitment.

3. Reply to the Special Civil Application has been filed by the respondents. They have come up with a case that the select list which has been prepared by the G.P.S.C. out of which four persons named in para-2

thereof have already been given the appointment on the dates mentioned against their names. It has been stated that even those four persons who have been given the appointments to the posts of A.R.T.Os. are in excess of the quota available to the direct recruits under the rules. Further statement has been made that direct recruits are in excess of their statutory quota and therefore, there is no question of appointing the present petitioner to the post of A.R.T.O.. It has next been contended that as per the Government circular dated 4-4-1979, the wait list containing the petitioner's name ought to have been scrapped by the State Government as the said list was prepared and published in the month of October, 1985, and thereafter two years have elapsed in the month of October, 1987. Replying to the contention of the petitioner that ten posts of A.R.T.Os. are lying vacant, the respondents have stated that not a single post of A.R.T.O. is vacant, which could be filled in by direct recruitment. Replying to the contention of the petitioner of the two posts of R.T.Os. and promotion thereon and consequent availability of two more posts of A.R.T.Os., the respondents contended that even if the Government decides to promote two A.R.T.Os. to the post of R.T.Os. then also two vacancies those may be occurred would go to promotees only in the light of ratio prescribed by Rule 5 of the Recruitment Rules, 1972.

4. Heard the learned counsel for the parties.

5. Admittedly, the name of the petitioner is placed by G.P.S.C. in the waiting list and not in the main list. It is a settled law that even if the vacancies are available and number of candidates found fit by the selection committee, the successful candidates would not acquire indefeasible right to be appointed. This right may be denied legitimately. Reference in this respect may have to the decision of the Hon'ble Supreme Court in the case of Shankarsan Dash vs. Union of India reported in 1991 (3) SCC 47.

6. Out of the main list, four candidates were given the appointment and parties are not in issue that these appointments have been made in the order of merit assigned to the candidates in the select list by the G.P.S.C.. Those four appointments undisputedly made by the respondents by direct recruitment are in excess of the quota available for direct recruits under the Rules, 1972. The ratio has been laid down for recruitment on the post of A.R.T.O. under the Rules, 1972 (statutory rules framed under Article 309 of the Constitution), then it has to be strictly followed and the respondents have

no licence to exceed either of the quota. The mandate of the rule is that the appointments on the posts of A.R.T.Os. in the department have to be made by the respondent by direct recruitment and promotion in the ratio as laid down under the Rules, 1972. Leaving apart the question that the petitioner's name was in waiting list even the four appointments which have been made from the main list were in excess of the quota, how this Court can permit the respondents, and more so, by issuing a writ of mandamus to make the appointments in excess of the quota as available for direct recruitment. This fact that the appointments by way of direct recruitment on the post of A.R.T.Os. are made in excess of the quota is not disputed and if the prayer of the petitioner is accepted by this Court and a writ of mandamus is issued then this Court will ask the respondents to act contrary to the statutory provisions. No writ of mandamus or any other appropriate writ, order or direction can be issued by this Court to direct the respondents to act contrary to the statutory rules. It will amount to perpetuate illegality by the Court sitting under Article 226 of the Constitution.

7. In the case of Prem Singh vs. Haryana State Electricity Board reported in 1996 (4) SCC 319, Their Lordships of the Supreme Court held that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. It has further been held by the Supreme Court that if the requisition and the advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The Court has further observed that the State can deviate from the advertisement and make appointments on the posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. So it is not permissible for the respondents to make the appointments of the candidates in excess of the number of the posts advertised. In the aforesaid case, the Court has further observed that where the challenge has been made by the candidates affected to the filling up of more posts than the posts advertised, the Court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and interest of persons seeking public employment. So what relief should be granted in such cases, as observed by the Hon'ble Supreme Court in the aforesaid

case, would depend upon the facts and circumstances of each case.

8. In that case, as against the 62 advertised posts, the State Electricity Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking the Court has observed that the Board was not justified in making more than 62 appointments pursuant to the advertisement and the selection process which followed thereafter. The Court has further observed that the Board could have taken into account not only the actual vacancies, but the vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. After making a calculation of the anticipated vacancies and the vacancies which had occurred due to death of incumbents, 25 additional posts were taken into consideration and the appointments made beyond 87 posts were held to be invalid.

9. The petitioner has very conveniently avoided to give how many posts were advertised. It is also not the case of the petitioner that the posts advertised were more than four posts. How many anticipated vacancies were there has also not been given by the petitioner. It is also not the case of the petitioner that only four candidates were placed in the select list. There may be more number of candidates in the select list than four, who would not have been given the appointments. It is a case where all the candidates who have been placed in the select list may not be given the appointments. So, when the candidates in the main list have not been given the appointments, how the petitioner who is placed admittedly in the waiting list can justify his claim for appointment.

10. In the case of Gujarat State Dy. Executive Engineers' Association vs. State of Gujarat & Ors. reported in 1994 (Supp) (2) SCC 591, the Hon'ble Supreme Court has held that the waiting list prepared in the service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How the waiting list should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For example, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares

a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. Therefore, once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. It has further been held by the Hon'ble Supreme Court that a waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list.

11. In the case in hand, even the main list has not been exhausted. There is no question of making any selection from the waiting list as held by the Hon'ble Supreme Court in the aforesaid case for filling up of the future vacancies. The respondents do not want to act upon the waiting list, and as such, it cannot be said that there is some extreme exigency with the Government which may as a matter of policy decision pick up persons in order of merit from the waiting list. None of the legal or fundamental rights of the petitioner have been infringed in the present case. This writ petition is wholly misconceived and the same deserves to be dismissed. Order accordingly.

12. This Special Civil Application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated.

zgs/-